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Rationally irrational

How rational case decisions can lead to irrational outcomes


Cooper

By Miles B. Cooper

The lawyer analyzed the case when it first came in. Clear liability. Objective injuries. Decent insurance coverage. It should resolve after ordering the medical records, doing a strong demand package, and doing some lien resolution work, right? Or so the lawyer thought. Now, many depositions in and a week before expert disclosure, the lawyer was wondering what to do. The costs were devouring the potential recovery. But perhaps with a little more work, the defense would come to the table…

The sunk cost fallacy

Economists and game theorists describe these situations as "sunk cost fallacies." One has put a bunch of time, effort, or money into something – the sunk cost. With all that investment, shouldn't one see it through? A simple example: one purchases an expensive concert ticket well before the event. The day arrives and one is sick as a dog. Because the ticket was expensive, one goes to the concert and has a miserable time. The sunk cost fallacy leads a rational decision maker to justify an irrational outcome.

The garden path corollary

The garden path corollary, a colleague's term coined during a late night two-wheeled strategy session (nothing beats riding bikes when brainstorming) is frighteningly similar to the sunk cost fallacy, but leads to the opposite conclusion. In the corollary, one is so close to successful completion that it is a mistake to *not* continue. One must continue down each stepping stone of the garden path, seeing it to its end.

An extreme example: one calculates that the break-even time investment into a case is 1,000 work hours. Beyond that point, one won't make a profit. The night before closing argument, the meter hits 1,000 hours. And with that, the lawyer – theoretically rational – quits the case. Rather than deliver the closing, the lawyer stops work. Malpractice issues aside, for the sake of a few hours, the lawyer walks away from compensation for the totality of the work already done. Not wise, even if one makes the decision to avoid a sunk cost fallacy. Spotting and differentiating between a sunk cost fallacy scenario and a garden path corollary can be difficult. Brainstorming cases with colleagues helps.

The more you know

Knowing the problem, how does one avoid it? There's the devil's way. Settle every case at the earliest opportunity for whatever is being offered. That's the "mill" business model – mills churn and burn cases (and clients.) Rational lawyers dedicated to staying current on legal issues won't choose this option (that's you, dear reader, who took the time to pick up this fine magazine). Then there's the sophisticate's way. Take cases worth seven figures or more.

Those case margins tend to reduce sunk cost fallacy scenarios. Assuming one does not run a mill, or the regional apex firm, one must find other methods to avoid fallacies. One method is to not Pollyanna cases. Some lawyers tend to focus on the upside when looking at new cases. But some cases scream out, "I'm going to be a huge time suck without a good result for the client," from the very beginning. Frequent case reassessment also helps. It is far easier to tell a client early on that their case is unlikely to yield a good outcome, even with more work, than it is to put a client through futile litigation stress. Being direct can be difficult. But it is part of our job.

Finally, despite the best intentions, sometimes one finds oneself in a situation where it is not rational to try the case, but it is also not rational for the client to accept a net zero settlement. Assuming the client is not exposed to prevailing party costs, there is only one choice: try the damned case, even if common sense would dictate otherwise. If one is headed toward trial, make a well-timed formal offer to compromise under C.C.P. § 998. But make it clear at the mandatory settlement conference that this is the floor, not the starting point. (I know, easy to say, harder to do.) A beatable 998 helps lessen the case costs' sting.

Guiding potential sunk cost fallacy cases toward the expedited jury trial system is another way to contain costs and make sure there is a net to the client in these otherwise difficult situations.

Outro

Back to our lawyer and expert disclosure. The lawyer did a little more work. The little more? Sending out a 998 and trying the case. The result? Compensation for the client. A net loss for the lawyer's time. But invaluable time in front of a jury. After all, any day in trial is better than a day at the office.

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